No. 21998

IN THE

United States Court of Appeals For the Ninth Circuit

V. L. JOHNSON, d/b/a V. L. JOHNSON LUMBER CO.,
Appellant,
v.
CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO.,
Appellee.

APPEAL FROM THE UNITED STATES COURT
FOR THE DISTRICT OF IDAHO,
NORTHERN DIVISION

HONORABLE RAY MCNICHOLS, *District Judge*

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Although appellant's statement of the case is fairly extensive, it is inaccurate in some respects and not complete. For such reasons, it is felt that appellee should restate same.

It should be first noted that only five witnesses testified in the case: V. L. Johnson, the appellant; T. M. Pajari, the railroad's division engineer; Dennis J. Sullivan, the railroad's district manager of sales; Joseph J. Holland, the railroad's station agent at Bovill, Idaho; and William H. Glindenan, a lumber broker.

Appellee's railroad operates interstate from Seattle, Washington, to Chicago, Illinois. The main line passes through St. Maries, Idaho. A branch line extends from St. Maries to Bovill, Idaho, where it splits, one branch running from Bovill to Palouse, Washington, and a second branch line running from Bovill to Elk River, Idaho. It is this Bovill-Elk River branch line which is the subject of this litigation.

The Bovill-Elk River branch line is approximately twenty miles in length. This branch line serves three shippers at Elk River, namely, Gilbert Dahl, d/b/a North Idaho Cedar Company; V. L. Johnson, the appellant herein, d/b/a Johnson Lumber Co.; and the Diamond National Corporation. Diamond ships logs, Dahl shingles and Johnson lumber. Practically all of this movement is outbound.

The branch line in question was constructed about 1910. About four miles west of Elk River, it was necessary at time of construction to tunnel through a mountain. This tunnel is commonly known as the "Neva Tunnel." The shoring for such tunnel is timber.

Appellee railroad, of course, during the course of each year inspects and maintains all of its operating right of way facilities, including tracks, bridges, tunnels and stations (Tr. 64 and 65). Such inspection and maintenance included the Neva Tunnel (Tr. 65, l. 22). The railroad's division engineer, T. M. Pajari, would inspect the tunnel three or four times a year (Tr. 69, l. 25), the chief carpenter at least once a year, and in between the track forces and roadmaster as part of their normal duties would keep their eyes open for any unusual conditions (Tr. 70, l. 1), the same as other right of way facilities.

In 1954 and 1955, some new frames were placed and some old frames replaced in the tunnel (Tr. 66, l. 11). During the period 1954 through 1966, maintenance work as necessary was performed in the tunnel (Tr. 66, l. 19). In 1964 some work other than normal maintenance was contemplated but was not carried out because it was not considered necessary (Tr. 70, l. 9). Being a timber structure, the tunnel did, however, present maintenance problems (Tr. 44, l. 1). In 1954 and 1955 negotiations were carried on between the railroad and the State of Idaho Highway Department with the idea of putting a cut through the hill, eliminating the tunnel, and relocating both the road and the railroad tracks running to Elk River through such cut, with the cost being shared by the railroad and the state. The railroad was interested in the cut since it would eliminate tunnel maintenance (Tr. 67, l. 4). However, because no mutually satisfactory agreement could be arrived at between the railroad and the state (Tr. 67, l. 11) and because the repairs done at that time were sufficient to continue the line in service, negotiations were terminated (Tr. 86, l. 1). Late in 1965, the Idaho Department of Highways contacted the railroad about the contemplated joint venture of open-cutting the tunnel for both rail and highway service (Tr. 59, l. 11 Tr. 86, l. 1). Division engineer T. M. Pajari was instructed by the railroad to review the matter in the field and to advise his superiors in this regard (Tr. 86, l. 1). The railroad had already made a basic survey of the contemplated cut in 1954, when the matter was first discussed with the state (Tr. 81, l. 3).

During the period 1954 to April of 1966, the tunnel was in operation and the railroad's trains were running

through it (Tr. 70, l. 11). On April 1, 1966, railroad carpenter Hanson advised T. M. Pajari, division engineer, that there was some work to be done on the frames at the west end of the tunnel. A crew was to be dispatched to do such work (Tr. 55, l. 25).

While the crew was on the ground doing the work on April 12th, a slide took place in the said west end of the tunnel (Tr. 56, l. 20). The five to ten frames involved were replaced (Tr. 58, l. 1), the debris cleaned up, and the tunnel opened for railroad operations on April 15th (Tr. 69, ll. 4, 17).

On May 12, 1966, railroad division engineer T. M. Pajari received a telephone call that a serious new condition had developed in the tunnel (Tr. 70, l. 24), and he immediately went to the site and inspected same. Inspection disclosed a massive movement of earth and rock above the tunnel (Tr. 71, l. 22), which could be likened to a localized earthquake (Tr. 97, l. 20). It was definitely a different condition than previously (Tr. 71, l. 21), and a type of earth and rock movement which had never before occurred (Tr. 72, l. 3). Whereas previously there might have been a normal failure of timbers because of age, moisture and so forth, this was actually a separation of the fibers of the timbers (Tr. 72, l. 7). Inspection further disclosed that 90 percent of all segments in the tunnel had new cracks or additional openings in old cracks (Tr. 71, l. 5). They were both in the vertical and horizontal plane. The tunnel lining was also displaced. Most of the movement in the tunnel had taken place in the past week (Tr. 74). In regard to foreseeability, Mr. Pajari testified (Tr. 95, l. 24):

"Q. Was that a condition that could have been anticipated?

"A. I don't think so."

And on page 98, l. 25, in answer to a question propounded by appellant's attorney, he further testified:

"Q. With respect to the tunnel the conditions that existed there were reported to you and others in 1964, and going back over the years the reference to the rotten condition of the timber bents, whatever they are, and the general problem of the lining of the tunnel and things, you could anticipate could you not, that some day the tunnel might collapse, couldn't you?

"A. No, not on the basis of our maintenance operations and inspections."

There had never been this type of movement of earth and rock prior to May 12, 1966 (Tr. 72, l. 3). Following inspection on May 12th, upon the division engineer's initiative, the tunnel was closed. Use of the tunnel by trains in such condition would jeopardize lives and equipment (Tr. 77, ll. 16, 20).

The railroad was anxious to remedy the situation as soon as possible. Having netted revenue of at least $36,000 from Elk River in 1965, closure of the line meant loss of money to the railroad (Tr. 118, l. 3; Tr. 95, ll. 2, 8).

Three alternatives were presented to remedy the situation (Tr. 78, l. 16); (1) All 130 of the timber frames could be replaced with new timber frames. This would be a delicate, dangerous operation to workmen (Tr. 78, l. 15), and would take a minimum of three to four months to complete after men and equipment were on the site (Tr. 80, l. 10; Tr. 96, l. 9). (2) The timber frames could be replaced with concrete frames. This also would be a

delicate, dangerous operation to workmen (Tr. 78, l. 15) and would take a minimum of five to six months to complete (Tr. 96, l. 9). (3) The third alternative was elimination of the tunnel and replacement with a cut. This would be a more permanent improvement, since it would eliminate the maintenance problem (Tr. 79, l. 14). Such work would ordinarily take at least five to six months (Tr. 79, l. 22).

After study, it was decided to eliminate the tunnel and to jointly participate with the highway department of the State of Idaho in a cut for both rail and road use (Tr. 92, l. 17). Much work was involved. Surveys had to be completed by both parties (Tr. 81, l. 15), land purchased (Tr. 83, l. 15), and plans and specifications prepared (Tr. 83, l. 1). Because it involved expenditure of a considerable sum of money, the railroad had to have approval by its head office (Tr. 80, l. 19) and the State Highway Department had to get commission approval (Tr. 82, l. 8). When such preliminary work was completed, excavation bids were advertised on July 22nd (Tr. 82, l. 17), and the excavation bid let to Morrison-Knudsen Company on August 15th. The contract between Morrison-Knudsen and the parties was formalized August 17th, and excavation work was comenced August 23rd and was completed October 14th (Tr. 94, l. 1). During and after completion of the excavation work, the railroad itself installed the tracks (Tr. 94, l. 7). The total excavation cost was $178,-971.95, of which the state contributed $68,950.65, not including the cost to the railroad for installation of track and grading (Tr. 95). The Bovill-Elk River branch was re-opened for business October 17, 1966. The tunnel was closed to traffic a total of five months.

It should be noted that whether this work connected with the cut, or new timber shoring or concrete shoring installed in the tunnel, had been done in 1954, 1966, or any other time, it necessarily would have to be done in the summer months. The Elk River area has about four months of good weather a year. During the other eight months there is mud and snow on the ground (Tr. 32, ll. 9, 12, 22). Any work of this type would have to be carried out during the summer months (Tr. 79, l. 17; Tr. 96, l. 21).

Appellant brought this action seeking recovery of alleged lost profits due to his alleged inability to ship lumber by rail from Elk River during the five months the tunnel was closed and rail service suspended.

Turning to V. L. Johnson, the appellant herein, it should be noted that both he and Gilbert Dahl were informed by the railroad's agent at Bovill, Joseph J. Holland, the morning of May 13, 1966 . . . the day following the closing of the tunnel . . . that the tunnel was condemned and rail service suspended (Tr. 134, l. 20). Appellant asked Mr. Holland as to how long the tunnel would be closed, and Mr. Holland was unable to tell him since he didn't have the slightest idea as to the extent of damage or how long it would take to correct the situation (Tr. 136, l. 4). During the period service was suspended, appellant and Mr. Holland had several conversations in this regard, and Mr. Holland was never able to tell him when service would be restored for the reasons mentioned (Tr. 142, l. 14). Appellant called Dennis J. Sullivan, the railroad's manager of sales, in this regard, and Mr. Sullivan also told him that he did not know for sure when service would be restored (Tr. 111, l. 15).

From "hearsay," Mr. Johnson concluded that service would be restored in July or on July 15th (Tr. 165, l. 9), but such misinformation was never given him by Mr. Holland nor by Mr. Sullivan . . . the only two people on the railroad with whom appellant talked.

The railroad had no agent at Elk River, and bills of lading were normally issued by the Bovill agent, Mr. Holland, to Elk River shippers (Tr. 133, l. 19). Knowing that the agent at Bovill would not accept a bill of lading, appellant, or someone on his behalf, went to Plummer, Idaho, later during the day of May 13th and got the railroad agent at such station to accept a bill of lading for one car of lumber (Tr. 152, l. 25; Tr. 153, l. 1). The agent at Plummer at such time did not know of the closing of the tunnel. Because a bill of lading is a contract, the railroad was obligated to move this one car load, and hired a common trial carrier, the Garrett Auto Freight Company, to move it (Tr. 149, l. 1).

In his statement of facts, appellant alleges that no other common carriers served Elk River. This is incorrect. A highway connects Elk River and Bovill. As mentioned in the previous paragraph, Garrett Auto Freight served Elk River (Tr. 155, l. 2). Appellant himself moved a load of lumber by truck common carrier to Denver the summer of 1966 (Tr. 11, l. 19). Appellant knew of two truck line common carriers who could haul from Elk River to rail site at Bovill, where there was no loading platform, or to rail site in St. Maries, where there was a loading platform (Tr. 25, l. 25; Tr. 30, l. 24). The record also indicates that 50 percent of the produce of Gilbert Dahl moved by truck common carrier even be-

fore the closing of the tunnel (Tr. 37, l. 1). Appellant made very little effort to discover other common carrier truckers (Tr. 27, 28). The only reason that appellant chose not to move his produce by truck was because such service was more expensive than rail (Tr. 29). In this regard, he made no effort whatsoever to mitigate his alleged damages. Instead, appellant chose not to move his produce and waited to sue the railroad for alleged damages.

At trial level, after appellant had completed his case, the trial judge concluded that the railroad's closing of the tunnel was due to an unusual massive movement of earth, and not through the negligence of appellee; that after closing, the railroad acted reasonably in its procedure to reinstate rail service; that appellant had not proved damages by a reasonable measure; and granted appellee's motion to dismiss the action. It is submitted that the trial court's conclusions and ruling should be sustained.

ARGUMENT OF THE CASE

Summarizing appellant's many arguments, it appears that he only seriously contends that the trial court erred in granting appellee's motion to dismiss on basically four grounds: (1) that the condemnation of the tunnel was due to appellee's negligence in maintenance; (2) that even if the closure was not due to appellee's negligence, appellee had a duty to truck out appellant's produce . . . or at least participate in paying freight charges for appellant . . . since rail service wasn't available; (3) that appellee was negligent in not sooner restoring rail service; and (4) that appellant proved damages.

There is no evidence whatsoever in the record to support his arguments in these regards.

These points will be answered separately and more fully under each of these headings.

(1) Condemnation of Tunnel Not Due to Appellee's Negligence

Only one witness testified on the cause of the condemnation of the tunnel, T. M.Pajari, appellee's division engineer.

As earlier pointed out, Mr. Pajari stated that the tunnel closing on May 12, 1966, was due to a massive movement of earth and rock above the tunnel (Tr. 71, l. 22) which could be likened to a localized earthquake (Tr. 97, l. 20). There had never been a movement of this type before May 12, 1966 (Tr. 72, l. 3). It was a different condition than he had ever previously observed (Tr. 71, l. 21), and a type of earth and rock movement which had never before occurred (Tr. 72, l. 3). It was a condition that could not have been anticipated nor foreseen (Tr. 95, l. 24; Tr. 99, l. 1).

The right of a shipper to cars and service is not an absolute right and a carrier is not liable if it fails to furnish cars where such failure is due to unusual conditions making such impractical or impossible. Such is a complete defense to any action by a shipper.

For instance, a car shortage can be a complete defense to any action by a shipper for damages for failure to supply cars. As the general rule is stated in 9 Am. Jur., §355 (page 644):

"The rule is well settled that, while railroad com-

panies are bound to furnish a sufficient number of suitable cars for their usual and ordinary traffic, and to make reasonable efforts to meet such increased demand for cars as should be foreseen, *their failure to furnish cars, in the absence of a special contract, may be excused by a car shortage occasioned by an unusual and unexpected demand therefor which could not reasonably be anticipated,* as, for instance, where there is a sudden and unusual demand for stock or produce in the market, or where an unusual influx of freight arises from an excessive crop greater than the estimates made either by the railroad or by experts most familiar with crop conditions. . . . Also, if a carrier is unable to furnish cars at the time demanded without suffering an undue interference with its business or with the rights of other shippers, it may show such fact in defense of an action to hold it liable for losses occasioned by its neglect to furnish transportation. *It must also be borne in mind, in this connection, that a common carrier is not bound by its general public obligation to provide other means of transportation than such as it owns and uses or holds out to the public on its own route for that purpose. . . .*" (Emphasis supplied)

As this rule is stated in *Pennsylvania Ry. Co. v. Puritan Mining Co.,* (1915) 35 S.Ct. 484, 237 U.S. 121:

"Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. But this is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The common law of old in requiring the carrier to receive all goods and passengers recognized that he was not liable for failing to transport more than he could carry. . . . The law exacts only what is reasonable from such carriers—but, at the same time requires that they should be equally reasonable in the treatment of their patrons."

Also see *Midland Valley R. Co. v. Barkley,* (1928) 276 U.S. 482, 72 L.Ed. 664, 48 S.Ct. 342. Such inability to supply cars because of a shortage of cars due to an unforeseen demand absolves the carrier from the duty of furnishing them on the demand of a shipper, although its published tariff gives rates for transportation in such cars. *Pacific Fruit & Produce Co. v. Northern P. R. Co.,* (1920) 109 Wash. 481, 186 Pac. 852, 10 A.L.R. 337.

Congestion of traffic on a line is a valid excuse for failing to furnish a shipper with cars. *W. H. Blodget Co. v. New York Central Ry. Co.,* (1927) Mass., 159 N.E. 45, 55 A.L.R. 900.

An act of God in destroying property already in transit is a defense to any action against a carrier by a shipper for loss of same. *Northwestern Consol. Milling Co. v. Chicago, B. & Q. R. Co.,* (1917) Minn., 160 N.W. 1028. Likewise, an act of God preventing a carrier from furnishing cars, upon request, to a shipper is a defense. As the court stated in the tunnel case cited by appellant in his brief, *B. & O. R. Co. v. O'Donnell,* 49 Oh. St. 489, 32 N.E. 476, in approving the following instruction (page 480):

> "The instructions of the court upon this issue were to the effect that, if the tunnel was rendered impassable for cars, the defendant was excused from making delivery until the obstruction was cleared. . . . No exception was taken to this part of the charge (instruction), and it appears entirely unobjectionable." (Insert supplied)

In the case at hand, there is no evidence whatsoever that the movement of earth and rock above the tunnel, resulting in the tunnel's closure, could reasonably have been foreseen or anticipated by the railroad. The evi-

dence, to the contrary, clearly shows that such had never before occurred, was likened to a localized earthquake, and could not be anticipated. Such was in the realm of an act of God, and is a valid defense to any action by appellant. It is submitted that the trial court was correct in so concluding.

(2) Upon Closure of the Tunnel, Appellee Had No Duty to Furnish Appellant Truck Transportation

In his brief, appellant repeatedly alleges that even if the condemnation of Neva Tunnel was not due to the railroad's negligence, the railroad had the duty during the period service was suspended to either truck appellant's produce out of Elk River or to participate in paying a common truck carrier to perform such service. Such argument is entirely without merit.

The appellee is in the railroad business, not the trucking business (Tr. 118, l. 13). In order to operate trucks, the I.C.C. must grant authority or rights to so operate in a particular area, and, of course, the applicant must own trucks. Appellee has no trucking authority or rights in Idaho (Tr. 118, ll. 20, 23; Tr. 119, l. 1), and owns no trucks (Tr. 119, l. 4; Tr. 123, l. 2).

It is well-established law that a carrier is not required to furnish means of transportation other than it owns or holds out to the public on its route. *Atlantic Coast Line Ry. Co. v. Florida Fine Fruit Co.*, (1927) Florida, 112 S. 66; *James v. Davis,* (1922) Neb. C.C.A., 280 F. 780. Because appellee owned no trucks, had no truck route authority, and did not hold itself out as a common carrier in the trucking business, appellee had no duty to furnish appellant with truck service during the period rail service was suspended.

As far as participating with appellant in paying a common truck carrier to haul his produce from Elk River during the period rail service was suspended, such would be a violation of the Elkins Act, 49 U.S.C.A. §§41-43, and illegal. As appellant testified, truck rates are higher than rail rates. For appellee to participate in payment of same would be unlawful. Such would be discrimination against the other Elk River shippers and every other shipper in the area subject to the railroad's published tariff. Participating in payment of truck rates would mean that appellant would ship goods at less than the established truck tariff. The purpose of the Elkins Act was to make it a criminal offense for any person or corporation to give or receive any rebate, concession or discrimination in respect to transportation of property at a rate less than that named in the published tariff or whereby some other advantage is given or discrimination practiced. *U.S. v. Union Stock Yard Co.*, (1912) 33 S.Ct. 83, 226 U.S. 286. Even the mere act of appellant requesting such participation makes him guilty of a misdemeanor. Likewise, the mere offer of the railroad to so participate would make it guilty of a misdemeanor. *U. S. v. Leight Valley Ry.*, (1918), D.C.N.Y., 254 Fed. 332.

Along this same line, and as another arguing point, appellee mentions in his brief that although he could have found a common truck carrier to haul his produce to the Bovill rail site, there was no loading platform at such site. At Elk River, appellant himself loaded rail cars left on his industrial siding with a fork lift truck he owned. He could have loaded rail cars in Bovill with this fork lift truck, which necessitated hauling it to and from Elk River, or by renting a fork lift truck to keep in Bovill

during the time service was suspended. Appellant did not want to take his fork lift to Bovill each time, since it inconvenienced him (Tr. 30, l. 10), nor to rent a second fork lift truck, since such would cost him money (Tr. 30, l. 14). Instead, in his brief, he states that the railroad should have rented one for his use at Bovill. Such argument is also without merit.

Under the railroad's published tariff used by appellee for movement of lumber, shippers provide their own labor and own machines for loading railroad cars (Tr. 150, l. 11; Tr. 151, ll. 2, 6). Appellant loaded the railroad cars placed on his siding at Elk River, not the railroad. For the railroad to have rented and furnished appellant with a fork lift truck in Bovill would also have been a violation of the Elkins Act since such was not provided for in the railroad's published tariff. As it stated in *Pacific Fruit & Produce Co. v. Northern P. R. Co., supra,* at page 487:

> "A carrier in interstate commerce can enter into no contract of transportation for which there is not express authority in its filed and published tariffs. *Texas & Pacific R. Co. v. American Tie & Timber Co.*, 234 U.S. 138."

The evidence in the case clearly shows that the published tariff of the railroad did not include fork lift usage (Tr. 120, l. 1), and that furnishing one would result in both the railroad and shipper being penalized by the I.C.C. (Tr. 120, l. 16). There is no evidence whatsoever in the record to the contrary.

It is submitted that appellant's arguments about the railroad having a duty to furnish a truck, or to participate in paying common carrier truck rates with him, or to furnish him with a fork lift in Bovill, are totally without merit and entitled to no consideraton whatsoever.

(3) Appellee Renewed Service as Soon as Reasonably Possible

Only one witness testified on the subject of whether or not appellee restored rail service to Elk River as soon as reasonably possible, T. M. Pajari, the railroad's division engineer.

As was earlier pointed out in this brief under Statement of Fact, upon condemnation of the tunnel, three alternative methods were available to remedy the situation: (1) all 130 of the timber frames could be replaced with new timber frames, which would take a minimum of three to four months; or (2) the timber frames could be replaced with concrete frames, which would take five to six months; or (3) the tunnel could be eliminated and replaced with a cut, which would take at least five to six months. the latter method was selected since it was the more permanent type of improvement, and would reduce maintenance work.

As was also previously mentioned in the Statement of Facts, no matter when this work had been undertaken, it would have had to be done during the summer months (Tr. 96, l. 22). The Elk River area has only four good summer months a year, and the other eight months the ground is muddy or there is snow on the ground (Tr. 32, ll. 9, 12, 22).

Completing the work and renewing service within five months, considering the nature of the work, the parties involved, and the immensity of the job, was a task well done in the opinion of Mr. Pajari (Tr. 96, l. 12).

In the case under consideration, there is no evidence whatsoever that the job to be done under the circum-

stances could have been done more expeditiously, nor that the railroad did not act reasonably under the circumstances It is submitted that the trial court was correct in reaching such a conclusion.

(4) Appellant Failed to Prove Damages

In regard to appellant's argument in this regard, it is felt that the trial court's expressed opinion very adequately covers and answers appellant's argument, and needs no addition thereto (Tr. 183 and 184). It is submitted that the trial court was correct in its statements and conclusions.

CONCLUSION

The record of the lower court's proceedings discloses no evidence whatsoever supporting appellant's arguments. The facts are clear that the closing of the tunnel and suspension of rail service for five months was not the fault of the railroad, and that the railroad acted reasonably in restoring service. Not one witness testified to the contrary. Reasonable minds could not differ under the circumstances, and the trial court was correct in sustaining appellee's motion to dismiss at the conclusion of appellant's case.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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